



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

December 11, 2002

Mr. Brett Bray
Director, Motor Vehicle Division
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR2002-7065

Dear Mr. Bray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173432.

The Texas Department of Transportation (the "department") received a request for "access to all information collected, assembled or maintained by [the department] regarding petitions, complaints or requests for hearings or other action by [the department] filed by or on behalf of Buddy Gregg or Buddy Gregg Motor Homes, Inc.. This request is for all information relating to the complaints" You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

Initially, we note that the submitted closed case files constitute completed investigations made of, for, or by the department. Under section 552.022 of the Government Code, this information must be released unless it is expressly made confidential under other law or excepted from disclosure under section 552.108 of the Government Code. *See* Gov't Code § 552.022(a)(1). Sections 552.103 and 552.111 of the Government Code are discretionary exceptions under the Public Information Act and do not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 677 at 8-9 (2002) (section 552.111 not "other law" for purposes of section 552.022); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary

¹We assume that the sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

exceptions in general).² Therefore, we will not address your arguments under these sections with respect to the closed files. However, the Texas Supreme Court has held that “[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are ‘other law’ within the meaning of section 552.022.” *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). This office has determined that when the work-product privilege is claimed for information that is subject to release under section 552.022, the proper analysis is whether the information at issue is excepted under Texas Rule of Civil Procedure 192.5. ORD 677 at 8-9. We will therefore consider whether the closed case files are excepted under the rules or confidential under sections 552.101 or 552.130.

An attorney’s core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney’s representative that is developed in anticipation of litigation or for trial and that contains the attorney’s or the representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contains the attorney’s or the attorney’s representative’s mental impressions, opinions, conclusions, or legal theories. Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh*

²Although you assert that the submitted information constitutes attorney work product under section 552.107 of the Government Code, this office addresses work product in the context of section 552.111.

Corning Corp. v. Caldwell, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

You inform us that department's Motor Vehicle Board must conduct an investigation whenever it has reason to believe that a violation of the Texas Motor Vehicle Commission Code³ has occurred or is likely to occur and state that the submitted information was "prepared in anticipation of litigation or after the [department] commenced an action." We therefore find that you have satisfied the first prong of the work product test. Furthermore, we have reviewed the closed case files and conclude that a portion thereof reveals the attorneys' mental impressions, opinions, conclusions, or legal theories in preparing to litigate the closed cases. Having met both prongs of Rule 192.5, the department may withhold the information we have marked in the closed case files as attorney work product.

The department also seeks to withhold any social security numbers that are contained in the requested records under section 51.251 of the Occupations Code. Chapter 51 of the Occupations Code does not govern the department and instead concerns the Texas Department of Licensing and Regulation (the "Department of Licensing"). Furthermore, section 51.251 does not concern social security numbers and is not a confidentiality provision. *See* Occ. Code § 51.251 (providing that Department of Licensing shall prepare information describing functions of Department of Licensing and procedures by which complaints are filed and resolved and that Department of Licensing shall make such information available to public and appropriate state agencies); *see also* Open Records Decision No. 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality). We note, however, that Open Records Letter No. 2001-6050 (2001) authorizes the department to withhold under section 552.101 in conjunction with section 56.001 of the Occupations Code social security numbers on application materials for licenses issued by the department authorizing applicants to maintain motor vehicle dealerships. *See* Gov't Code § 552.301(a), (f); Open Records Decision No. 673 at 7-8 (2001) (discussing elements of previous determination for a particular category of information). Therefore, if the requested records contain a social security number that the department obtained in connection with an application for a license to maintain a motor vehicle dealership, then the department must withhold the social security number in accordance with Open Records Letter No. 2001-6050 (2001). Any other social security number contained in the requested records must be released unless it was obtained

³Tex. Occ. Code §§ 2301.001-.805.

or is maintained by the department pursuant to a provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 at 2-4 (1994) (discussing 1990 amendments to 42 U.S.C. § 405(c)(2)(C)(viii)(I)).

We note that a portion of the closed case files must be withheld under section 552.101 in conjunction with the common law right of privacy. The doctrine of common law privacy protects information if it is highly intimate or embarrassing such that its release would be highly objectionable to a reasonable person and the public has no legitimate interest in it. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). Prior decisions of this office have found that personal financial information not relating to a financial transaction between an individual and a governmental body is protected by common law privacy. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the personal financial information in the submitted documents that must be withheld under section 552.101 in conjunction with common law privacy.

We also note that the closed case files include motor vehicle record information. Section 552.130 of the Government Code provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

We have marked the information in the closed case files that the department must withhold under section 552.130.

We also note that one of the closed case files includes bank account numbers. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. Pursuant to this exception, the department must withhold the account numbers we have marked.

We now address your arguments regarding the open case file. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The department has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The department must meet both prongs of this test for information to be excepted under 552.103(a). This office has determined that a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, constitutes litigation for the purposes of section 552.103. See Open Records Decision No. 588 at 7 (1991).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant

to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

As noted above, the department is charged with investigating suspected violations of the Texas Motor Vehicle Commission Code. You state that the department's Enforcement Section is currently pursuing an active case against Prevost Car, Inc., that the open case file relates to this case, and that a hearing has been concluded but no final order has been entered. Based on your representations and our review of the submitted information, we conclude that you have demonstrated that the open case file information relates to pending litigation involving the department for the purposes of section 552.103.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In addition, the applicability of section 552.103(a) ends once litigation has concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we have marked information in the closed case files that may be withheld under rule 192.5 as attorney work product. In accordance with Open Records Letter No. 2001-6050 (2001), to the extent that the requested information includes social security numbers on motor vehicle dealership application materials, such numbers must be withheld. Any other social security number contained in the requested records must be released unless it was obtained or is maintained by the department pursuant to a provision of law enacted on or after October 1, 1990. We have marked information in the closed case files that is excepted under the common law right of privacy and must be withheld under section 552.101. The department must also withhold motor vehicle record information and bank account numbers pursuant to sections 552.130 and 552.136 respectively. The remainder of the closed case files must be released. The open case file concerning Prevost Car, Inc. may be withheld under section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

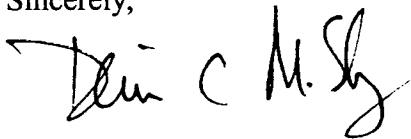
Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

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ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Denis C. McElroy". The signature is fluid and cursive, with the first name "Denis" being the most prominent.

Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 173432

Enc. Submitted documents

c: Mr. James D. Braddock
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(w/o enclosures)